Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MELVIN DEAN CANADA, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a certificate of appealability should have been issued because it can be reasonably debated whether *Booker* sets forth a logical continuation of the rights for defendants who were sentenced after *Apprendi*, and therefore should be applied retroactively, as it is not a new procedural rule?

II. Whether a certificate of appealability should have been issued because it can be reasonably debated that the right of confrontation as defined by *Crawford* should be applied retroactively?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below were Petitioner Melvin Dean Canada and the United States of America. The United States is the Respondent before this Court.

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I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this court; namely the determination of whether it is reasonably debatable that the decision in *United States v. Booker* is a logical continuation of the rights granted in *Apprendi*, and that a certificate of appealability should issue for the case to be decided on its merits.

II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the determination of whether it is reasonably debatable that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of

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OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit styled *United States v. Melvin Dean Canada,* No. 06-50251, issued on December 22, 2006, is attached hereto as Appendix A.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The Court of Appeals affirmed in an order entered December 22, 2006. There was no petition for rehearing. This petition follows within 90 days of the judgment of the Court of Appeals.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in

time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Canada pled guilty in Cause # A-02-CR-189 (01) HH pursuant to a plea agreement to a violation of 21 U.S.C. §841(a)(1). Canada was sentenced to 292 months imprisonment on the single count. The sentencing judge indicated that he was bound by the then mandatory sentencing guidelines, despite his feeling that it was "unpleasant" to sentence someone in Canada's position to the sentence demanded by the guidelines. Canada filed a Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 on January 4, 2006, under Cause # A-06-CA-0007H. This motion was denied by the district court on February 9, 2006.

Canada filed a notice of appeal to appeal the denial of his motion on February 14, 2006. Canada also filed a Motion for Certificate of Appealability on February 15, 2006. The district court granted the motion and issued a Certificate of Appealability on February 17th, 2006. Canada appealed the denial of his motion to the Fifth Circuit, in Cause #06-50251, and that appeal was denied on December

22, 2006. The appellate court also denied Canada's motion for a Certificate of Appealability, despite the district court's granting of one.

REASONS FOR GRATING THE WRIT

I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this court; namely the determination of whether it is reasonably debatable that the decision in *United States v. Booker* is a logical continuation of the rights granted in *Apprendi*, and that a certificate of appealability should issue for the case to be decided on its merits.

The Fifth Amendment provides in part that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Likewise, the Sixth Amendment provides in part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI. Recent jurisprudence in this court have provided more clarifications of these constitutional rights.

This court decided in *Apprendi v. United States*, 530 U.S. 466 (2000), that a jury, and not a judge, must provide the assessment of facts that increased the prescribed range of punishment for an offense. The decision in *Apprendi* was further clarified by the decisions in 2004 of *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).

Essentially, in *Blakely* and *Booker*, the Supreme Court delivered a knockout blow to binding sentencing guidelines. However, there remains the unresolved question of whether the thousands of federal prisoners sentenced before *Blakely* and *Booker* are entitled to any relief. Since most of their convictions are "final" (that is, the deadlines for filing appeals or petitions for certiorari have expired), these prisoners must resort to the federal habeas statute at 28

U.S.C. 2255 to attack their sentences under *Blakely* or *Booker*. This is the exact position that Canada finds himself in, and that the lower courts have denied a certificate of appealability to determine.

This court has the authority to review a denial of certificate of appealability, as established in *Hohn v. United States*, 524 U.S. 236 (1998). *Hohn* considered a case where this court had, following a direct review of the petitioner's case, altered the definition of the statute under which he was convicted. This court found that this change was a constitutional one, and remanded the case to the lower court to reconsider the case. Importantly, *Hohn* established that this court has the jurisdiction to reconsider a lower court's denial of a certificate of appealability.

To be eligible for a certificate of appealability, a petitioner must demonstrate that the point of appeal is at least reasonably debatable, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the Fifth Circuit has decided the issue of the retroactive applicability of *Booker* in *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005), Canada believes that this case is wrongly decided, and desires an opportunity to argue that point.

In brief, the argument that Canada would present, given the opportunity, is as follows. Before the decisions in *Blakely* and *Booker*, the federal guidelines required federal judges to lengthen many sentences for conduct neither found by a jury nor proved beyond a reasonable doubt. Through the collateral vehicle provided by a 2255 motion, federal prisoners could attack these types of sentences on two distinct constitutional theories: (1) the sentence violated the Sixth Amendment because a jury did not find facts legally essential to the punishment; and (2) the sentence violated the Due Process Clause of the Fifth Amendment because those same facts were not proved beyond a reasonable doubt. Collateral challengers may not, however, claim relief under a newly announced Court decision absent a threshold

determination by a federal court that the decision applies retroactively to cases on collateral review.

In Canada's case, the sentencing judge indicated his displeasure on the record in having to follow the Sentencing Guidelines in this case. Unlike many petitioners, Canada can reasonably argue that had the Sentencing Guidelines been merely advisory at the time of his sentencing, that his sentence would be substantially different. Canada therefore is in the relatively unique position in that a substantial showing can be made that his sentence would have been substantially different, had it occurred after *Blakely-Booker*.

The possibility remains that these prisoners will lack a forum in which to remedy any *Blakely-Booker* constitutional violations. This court has already declared nonretroactive the jury-trial prong of *Apprendi* (and a fortiori *Blakely* and *Booker*) in *Schriro v. Summerlin*, 542 U.S. 348 (2004).

The only potential challenge that remains is the Fifth Amendment due process violation as the only *Blakely-Booker* claim still cognizable in a 2255 motion. In the absence of a Supreme Court ruling to the contrary, lower courts are free to decide whether the *Blakely-Booker* due process requirement applies retroactively, as determined in *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). The Fifth Circuit has decided against the retroactive application of *Booker*, in *United States v. Gentry*, as have all other circuits to date. However, as this issue has not been decided by this court as of yet, it remains a reasonably debatable question, and therefore should be granted a certificate of appealability.

II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the

determination of whether it is reasonably debatable that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of appealability should issue for the case to be decided on its merits.

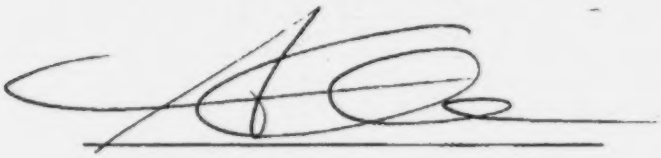
The Sixth Amendment provides, in part, that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), this court declared that an accused has the right to cross-examine any testimonial witnesses to be used against him or her, regardless of prior exceptions in the Rules of Evidence. At least one circuit, the Ninth, has declared that the rights in *Crawford* apply retroactively, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005).

As the question of both the retroactivity of *Crawford* and its application at sentencing have not yet been decided by this court, it is a reasonably debatable question that should be decided on its merits, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the lower courts declined to approve a certificate of appealability, this court has the jurisdiction to do so, as was decided in *Hohn*. Therefore, a certificate of appealability should be granted to decide this question.

CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted, and the case considered on its merits.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-50251

USDC No. A:06-CV-7
USDC No. 1-02-CR-189

UNITED STATES OF AMERICA, Plaintiff-Appellee,

Vs.

MELVIN DEAN CANADA, JR., also known as Tootie,
Defendant-Appellant

December 22, 2006, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas

Before **SMITH, WIENER**, and **OWEN**, Circuit Judges.

PER CURIAM

ORDER: Melvin Dean Canada was convicted pursuant to a plea agreement of possession with intent to distribute more than 5 grams of cocaine base, in violation of 21 U.S.C. § 841 (a)(1). He filed a 28 U.S.C. § 2255 motion to vacate his sentence, which was denied by the district court as time-barred. The district court granted a certificate of appealability (COA) as to Canada's claims that: (1) he should be permitted to argue the retroactivity of *United States v. Booker*, 543 U.S. 220 (2005) to cases on collateral review to the United States Supreme Court, notwithstanding this court's decision *United States v. Gentry*, 432 F. 3d 600 (5th Cir. 2005), and (2) he should be permitted to argue the

retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004) to cases on collateral review in this court.

However, this court has held that *Booker* is not retroactively applicable to cases on collateral review. *Gentry*, 432 F. 3d at 605-06. Additionally, *Crawford* was decided on March 8, 2004. 541 U.S. at 36. Because Canada's § 2255 motion was not filed until January 4, 2006, his claims regarding the applicability of *Crawford* are time-barred. Moreover, this court recently held that *Crawford* does not apply retroactively to cases on collateral review. *Lane v. Dretke*, 444 F. 3d 333, 336 (5th Cir. 2006), *petition for cert. filed* (June 13, 2006) (No. 05-11552). Thus, the district court did not err in concluding that Canada's § 2255 motion was time barred.

Canada requests a COA regarding his claim that, because his sentence was unlawfully enhanced under *Booker* and *Crawford*, his plea agreement, and specifically his appeal waiver, are invalid. This court will not generally address any issue not certified by the district court unless explicitly requested to do so. *See United States v. Kimler*, 150 F. 3d 429 (5th Cir. 1998); *Lackey v. Johnson*, 166 F. 3d 149 (5th Cir. 1997). Here, Canada explicitly requests a COA on this issue. However, Canada has not made a substantial showing of the denial of a constitutional right, and therefore his arguments on this issue are unavailing. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, Canada's motion for COA is **DENIED** and the district court's judgment is **AFFIRMED**.

PER CURIAM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-06-CA-7-H
Criminal No. A-02-CR-189

MELVIN DEAN CANADA, JR., Petitioner

Vs.

UNITED STATES OF AMERICA, Respondent

February 21, 2006, Filed

ORDER REGARDING CERTIFICATE OF APPEALABILITY: Petitioner Melvin Dean Canada, Jr., has filed a notice of appeal from the Court's order denying his motion to vacate sentence under 28 U.S.C. § 2255. The law requires him to obtain a certificate of appealability in order to pursue hi appeal. That in turn requires him to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2).

In his motion to vacate sentence, the Petitioner contends that the application of the Sentencing Reform Act and the Sentencing Guidelines in his case violated his rights to trial by jury and to confrontation of witnesses, both guaranteed by the Sixth Amendment to the Constitution of the United States. *See United States v. Booker*, 125 S. Ct. 738 (2005); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

The Court of Appeals for the Fifth Circuit has decided that the Supreme Court decision in *Booker* is not to be applied retroactively to cases in which judgments were final prior to the date of that decision. *United States v. Gentry*, 432 F. 3d 600 (5th Cir. 2005). The Petitioner

acknowledges this, but states that he wishes to preserve his right to present the issue to the Supreme Court of the United States. With respect to the *Crawford* decision, the Fifth Circuit has not decided whether it can be applied retroactively on collateral review of final judgments. *Lave v. Dretke*, 416 F. 3d 372, 378 (5th Cir. 2005). The Petitioner wishes to present this issue to the Court of Appeals. Considering the two issues together, the Petitioner may have made a substantial showing of the denial of a constitutional right under the Sixth Amendment. Therefore, the motion for a certificate of appealability should be granted.

It is therefore **ORDERED** that that the motion of Petitioner Melvin Dean Canada, Jr., for a certificate of appealablity be, and it is hereby, **GRANTED**.

It is further **ORDERED** that a certificate of appealability be, and it is hereby, **ISSUED** in this case, authorizing the Petitioner to pursue an appeal to the United States Court of Appeals for the Fifth Circuit.

SIGNED this 17th day of February, 2006.

HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE